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No. 88-309

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In The
Supreme Court of the United States
October Term, 1988

STATE OF WYOMING, *Petitioner*,
v.
UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF OF THE STATES OF MONTANA, NEW MEXICO, NEVADA, NORTH DAKOTA, SOUTH DAKOTA AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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October 21, 1988

QUESTIONS PRESENTED

1. Does a reserved water right impliedly exist for an Indian reservation where Congress provided that state water rights be obtained for the reservation?

2. Assuming, *arguendo*, that implied reserved water rights exist for such a reservation, may a reserved water right be implied for all practicably irrigable acres within the reservation in the presence of substantial state water rights in use on the reservation, obtained pursuant to Congressional directive, and in the absence of any demonstrated necessity for additional water to fulfill reservation purposes?

3. Again assuming, *arguendo*, that implied reserved water rights exist for such a reservation, what priority date should be accorded a reserved water right for practicably irrigable lands which were ceded by the reservation's tribes and became part of the public domain when such lands are later restored to and made part of the reservation by the United States or reacquired by the Indians from non-Indians?

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The amici curiae states named herein respectfully request that Wyoming's petition for a writ of certiorari to review the judgment of the Wyoming Supreme Court entered on February 24, 1988, be granted.

INTEREST OF AMICI

The western states named herein as amici curiae have intricate systems for determining and administering water rights. By and large, these systems are based on the doctrine of prior appropriation. Under this doctrine the states have established legal frameworks within which property rights to use water are created by allowing

holders of vested water rights to exercise exclusive control over a certain amount of water. The reliability and predictability of the water rights established under the appropriation doctrine have allowed the West to develop and become inhabited, notwithstanding its aridity.

In promoting the settlement and reclamation of the West, the federal government has relied heavily upon state created judicial and administrative procedures. This has been especially true with respect to western water law. This Court has repeatedly reaffirmed that development and management of western water resources must occur in conformity with state water law. *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1979). One exception to this purposeful and longstanding rule of deference is the doctrine of federal reserved water rights.

The doctrine of implied reserved federal water rights is a judicial doctrine which dates back to the turn of the century. Prior to its creation Congress had, through homesteading and mining laws, encouraged settlement of the West based on a system where water rights could only be obtained under state law, or local territorial law. *See e.g.*, Mining Act of 1866, 14 Stat. 253, 43 U.S.C. §661; Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. §322; *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). Appropriative water rights so established were, as this Court noted, "rights which the [federal] government had, by its conduct, recognized and encouraged and was bound to protect." *Broder v. Natoma Water and Mineral Co.*, 101 U.S. 274, 276 (1879). Congress also, in dealing with Indian tribes, established many Indian reservations in the western United States. However, with few exceptions, Congress did not address the question of water rights for such reservations. In 1908, this Court held that, notwithstanding lack of treaty provisions specifically dealing with water, Congress must have im-

pliedly reserved water from the Milk River when it set aside land for exclusive Indian use on the Fort Belknap Indian reservation. *Winters v. United States*, 207 U.S. 564 (1908). Thus, such "impliedly reserved" water rights were established judicially under federal law as opposed to under any state or federal statutory law.

Reserved water rights present challenges for western water managers because many of their characteristics are antithetical to appropriative water rights and to the administration of such rights. For example, Indian reserved rights do not depend on beneficial uses defined under state law. Indeed, the standard under which they should be quantified is not clear. Further, the "first in time, first in right" hierarchies developed under state management systems are severely impacted by Indian reserved rights because of the priority date such rights enjoy. In addition, Indian reserved rights are inchoate, that is they do not depend on non-interrupted use like state appropriative water rights do. Hence, the integration of Indian reserved water rights into the water management systems of the West has the potential of disturbing many existing rights, and thus affecting many established property interests.

As noted, the reserved rights doctrine is a doctrine of implication. Its characteristics have been defined on an ad hoc judicial basis. In other words, as the facts of a case have presented new issues to the courts, they have fashioned rules and applied them to the case at hand. Of course, such rules are also viewed as precedent for the resolution of other similar cases. Thus, the western states have been and continue to be particularly interested in all legal interpretations of the reserved rights doctrine.

The Wyoming Supreme Court's decision below touches upon a number of issues of interest to the western states. It

decided important federal questions in a manner both at odds with the holdings of this Court, and lower federal courts, and in a fashion which conflicts with principles contained in this Court's decisions. Further, the court below decided federal questions not yet reached by this Court. For these reasons, it should be reviewed by this Court.

As Wyoming has noted in its petition for a writ of certiorari, there are dozens of general adjudication proceedings currently under way throughout the West which affect the water rights for some fifty Indian reservations and over 250,000 private individuals. In addition, efforts are under way to negotiate the water rights of a number of Indian tribes. Final determination by this Court of the significant federal questions ruled upon by the Wyoming Supreme Court will aid efforts to determine and quantify Indian water rights throughout the West, both by litigation and negotiation. This assistance will simplify and expedite the resolution of many pending cases.

Further, the decision below has cast a cloud of uncertainty upon numerous property rights which must be integrated with Indian reserved water rights. As a result, and for the reasons previously stated, the amici states urge this Court to grant Wyoming's petition for a writ of certiorari to review the decision of the Wyoming Supreme Court and to reverse it insofar as it inappropriately construes the doctrine of impliedly reserved Indian water rights.

SUMMARY OF ARGUMENT

The doctrine of reserved water rights is a doctrine of "implication" designed to provide water rights for federal reservations where such reservations were created without regard to accompanying water rights. When Congress has

spoken to the question of water rights, it has consistently deferred to state water law. Where such Congressional pronouncements exist with regard to a reservation, no reserved rights should be implied. Further, reserved water rights should be recognized only to the extent that the primary purpose of a federal reservation would be entirely defeated without them.

In the case below Congress gave explicit direction that water rights for the Wind River Indian Reservation be obtained under state law. Thus, no impliedly reserved water right should be recognized for the reservation. Further, the primary purposes of the reservation have been fulfilled after years of agricultural development based on acquisition of water rights under state law. Recognition of a federal reserved water right is therefore unnecessary.

Where reserved water rights are recognized, their quantification must be limited by certain restrictions prescribed by this Court. The Wyoming Supreme Court erred in its decision below with respect to the quantity of water rights it awarded the Indians on the Wind River Reservation, assuming such rights should have been awarded at all. Further, the court erred with respect to the priority date of a substantial portion of the Indian reserved water rights. Reserved water rights for lands which passed out of Indian ownership, but were then reacquired, should not, under the rulings of any federal court, automatically have a priority date as of the date of the original creation of the Indian reservation.

ARGUMENT

I. IMPLYING THE EXISTENCE OF A FEDERAL RESERVED WATER RIGHT IS UNWARRANTED IN THE FACE OF CONGRESSIONAL DIRECTION THAT WATER FOR AN INDIAN RESERVATION BE ACQUIRED UNDER STATE LAW AND WHERE SUBSTANTIAL WATER RIGHTS HAVE BEEN ACQUIRED UNDER STATE LAW FOR INDIANS ON THE RESERVATION.

The doctrine of reserved water right is one "built on implication and is an exception to Congress' explicit deference to state water law in other areas." *United States v. New Mexico, supra*, 438 U.S. at 715. Where treaties and other documents creating federal reservations have been silent with respect to water use, this Court has chosen to imply the existence of water rights without which the primary purposes of the reservation would be totally defeated. But because of the history of purposeful Congressional deference to state water law, the Court has limited the scope of the reserved rights doctrine and the quantity of water which may be claimed under it. *See, Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico, supra*, 438 U.S. 696.

The Wind River Indian Reservation was created by the Second Treaty of Fort Bridger, 15 Stat. 673 (1868). Subsequently it was reduced in size. The most substantial reduction occurred under the Second McLaughlin Agreement of 1904, which was ratified by the Act of March 3, 1905. 33 Stat. 1016 (1905) (hereafter referred to as the "1905 Act"). An active allotment program was undertaken with respect to the reservation. Approximately 2,500 allotments, comprising over 240,000 acres of land, passed into individual Indian ownership. Also, the 1905 Act ceded land to the U.S. Government. About 90,000 acres of this

land was entered and settled by non-Indians and another 336,000 acres were withdrawn for a federal reclamation project open to homestead entry under the Act of March 4, 1921. Ch. 161, 41 Stat. 1367 (1921).

Although the original documents creating the reservation were silent with respect to water rights, the 1905 Act was not. Article III of the act contained a "Water Proviso" wherein a portion of the receipts from the sale of ceded lands originally part of the reservation were sequestered to fund acquisition of water rights for Indians under Wyoming state law. Supplemental federal appropriations were also made available for this purpose. From 1905 to 1915, state water rights were obtained to allow Indians to irrigate some 145,000 acres of reservation land, including over two thirds of the lands for which federal reserved rights were awarded by the Wyoming Supreme Court in its decision below. Also, thousands of non-Indians purchased lands ceded under the 1905 Act and applied for and were granted state water right permits to irrigate some 400,000 acres. Indians and non-Indians cooperated in the development of irrigation projects and were governed by Wyoming water law.

Congress has directed that water rights be obtained under applicable state law for a relatively small number of Indian reservations. In most cases, as in *Winters*, Congress was silent with respect to water for Indian reservations. However, where Congress has explicitly addressed the question of water for a reservation, that direction should be binding. No implication is necessary as to Congressional intent where such intent has been made manifest by Congress itself. The Water Proviso of the 1905 Act expresses Congress' intent that water for the Wind River Indian Reservation be obtained pursuant to Wyoming state law. Nevertheless, the Wyoming Supreme Court chose to infer the existence of a contrary intent, namely

that Congress established water rights for the reservation without regard to state law. Indeed, the lower court sanctioned the special master's approach which assigned to Wyoming the burden of proving that a reserved right for the reservation did **not** exist.

Further, the Wyoming Supreme Court virtually disregarded the language of the Water Proviso of the 1905 Act, as well as actions carried out pursuant to the proviso to develop irrigable lands on the reservation with Wyoming granted water rights. The court simply concluded that the water proviso and its legislative history were no indication of Congressional intent concerning the reservation of water for the Shoshone and Arapaho Indian people. The court made no attempt to reconcile the explicit Congressional direction to comply with state law contained in the 1905 Act with its decision to imply the existence of a contrary intent to disregard state law.

It should also be noted that this Court has held the existence of a reserved federal water right is to be implied only if "the purposes of the reservation would be entirely defeated" without it. *New Mexico, supra*, 438 U.S. at 700. Thus, where Congress expressly creates another means to provide water for the purposes of a reservation, the justification for the implication of a reserved water right for that reservation is absent. *See*, Solicitor's Opinion Regarding Federal Reserved Water Rights in Wilderness Areas, M-36914 (Supp. III), July 26, 1988 (denying the existence of federal reserved water rights for wilderness areas because of legislative language and legislative history indicating that such rights should be obtained under state law). In the case below, neither the Indians nor their trustees presented evidence demonstrating that the purpose of the Wind River Reservation would be defeated without implication of reserved water rights. Indeed, it is difficult to envision how such a showing could be made in

light of the numerous water rights that have been obtained under Wyoming law and the substantial development that has taken place on the reservation based on those rights.

This Court should grant Wyoming's petition for writ of certiorari to review the Wyoming Supreme Court's interpretation of Congressional intent, in light of the explicit directions contained in the 1905 Act, and the actions taken pursuant to those directions. Where Congress has expressed its intent that water rights for a reservation be obtained under state law and where water rights for a substantial portion of a reservation have been so acquired, no impliedly reserved federal water right should be recognized.

II. ASSUMING, *ARGUENDO*, THAT A RESERVED WATER RIGHT SHOULD BE RECOGNIZED FOR THE WIND RIVER INDIAN RESERVATION, THE WYOMING SUPREME COURT ERRED IN THE QUANTIFICATION OF THAT RIGHT.

Eighty years after the *Winters* case was decided, reserved rights have been quantified for only a handful of Indian reservations. One important reason for this is that no general standard for quantification of Indian reserved rights has been established by this Court. In 1963, this Court found that the amount of water reserved for certain agricultural Indian reservations on the Colorado River was "enough water...to irrigate all the practicably irrigable acreage on the reservation[s]." *Arizona v. California*, 373 U.S. 546, 600 (1963)(*Arizona I*). Nowhere in the opinion did this Court declare that the practicably irrigable acreage standard is **the** standard by which quantification would (or should) be reached for all Indian reservations.

The standard for quantification of reserved rights has become more restrictive in cases decided after *Arizona I*. In 1976, this Court held that the amount of water for a federal reservation's reserved right must be "tailored" so as to be only that sufficient to meet its "minimal need." *Cappaert v. United States, supra*, 426 U.S. at 141. "The implied reservation of water doctrine," this Court stated, "reserves only that amount of water necessary to fulfill the purpose of the reservation, *no more*." *Id.* (emphasis added). Two years later this Court noted:

> In the arid parts of the West...claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities [of water] to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western States, which lands form the brightly colored swaths across the maps of those states.

New Mexico, supra, 438 U.S. § 699. Where there is no surplus of water in a water course, the Court said, quantification of reserved rights requires a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *Id.*, at 705. Against this backdrop, the Court stated:

> Each time this Court has applied the 'implied-reservation-of-water-doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be *entirely defeated*.

Id., at 700 (emphasis added). The Court went on to define "purposes of the reservation" to mean its primary pur-

poses, as opposed to its related secondary purposes or uses. Although *New Mexico* dealt with non-Indian federal reserved water rights, the opinion analyzed Indian and non-Indian reserved rights interchangeably.

The next year, this Court dealt with a case involving Indian fishing rights and in its ruling set forth guidelines which apply to Indian rights to natural resources in general. The Court held that the underlying principle to be followed in quantifying Indian rights to natural resources is to provide Indians with a moderate standard of living. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra*, 443 U.S. 658 (1979). The Court indicated that its holding was indeed related to the standard for quantification of impliedly reserved Indian water rights stating:

> As in *Arizona v. California* [*Arizona I*] and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood - that is to say, a moderate living.

Id. at 686.

In 1983, the United States and the Indian tribes sought an increase in their adjudicated water rights in *Arizona I* and the states sought review of the practicably irrigable acreage standard. To preserve finality in that case, the Court refused to reopen the quantification issue *Arizona v. California*, 460 U.S. 605 (1983) (*Arizona II*). However, the Court gave no indication in *Arizona II* that the practicably irrigable acreage standard of *Arizona I* must be applied universally to Indian reservations throughout the West.

In the instant situation two facts are particularly important. First, the Indian people living on the Wind River Reservation have developed substantial irrigated land within the reservation boundaries. Under Article III of the 1905 Act, water rights were originally acquired for 145,000 acres of reservation land, over two thirds of the same lands awarded a reserved right in the decision below. Perfection of these rights was pursued for many years by the federal Indian Service and extensions were granted by the Wyoming State Engineer where, for example, construction delays prevented timely application of water to beneficial use.

After *Arizona I* was decided the Bureau of Indian Affairs, successor to the Indian Service, ceased requesting extensions and water permits for 58,000 acres expired. However, this left in place perfected rights for some 87,000 acres of Indian land. The Wyoming State Engineer has made it clear that the expired permits could be reinstated upon receipt of proper applications. Existing rights have allowed for substantial development of agriculture on the reservation, and further development could be pursued by reinstating permits which have been allowed to lapse. Hence, the Wyoming Supreme Court did not need to recognize significantly greater water rights under the reservation doctrine to avoid "entirely defeat[ing]" the primary purpose of the reservation.

Moreover, in awarding a reserved right greatly exceeding historic irrigation development on the reservation, the Wyoming Supreme Court's decision is in direct conflict with a decision of the Ninth Circuit Court of Appeals. In *United States v. Walker River Irrigation Dist.*, 104 F. 2d 334 (9th Cir. 1939), the Ninth Circuit addressed the quantification of Indian reserved water rights where there was a history of irrigation development on the reservation. On the Walker River Indian Reservation in Nevada an

estimated 26.25 second feet of water had been historically used to irrigate 2,100 acres of land. *Id.*, at 340. There was no showing of "necessity or demand for cultivation of a larger area...." *Id.* Thus, the Ninth Circuit limited the reserved right to that exact amount. The court said:

> We are constrained to accept this estimate [26.25 c.f.s.] as a fair measure of the needs of the Government [as trustee for the Indians] as demonstrated by seventy years' experience.* * * So precious is every miner's inch of water in these parched regions that no arrangement should be countenanced which would encourage waste or tend to induce it.

Id., at 339-40.of water in these

Secondly, the Wyoming Supreme Court simply made no effort to integrate the "moderate living" standard of *Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra*, with the "practicably irrigable acreage" standard of *Arizona I*. Rather, it mechanistically applied the practicably irrigable acreage standard as though no irrigation development had taken place on the reservation and as though the practicably irrigable acreage standard were the one and only standard for quantification of Indian reserved water rights.

The amici states assert that, given the restrictive language of recent cases decided by this Court concerning the proper standard for quantification of reserved water rights, specific guidance from this Court is needed with respect to the standard for quantification of Indian reserved water rights utilized by the Wyoming Supreme Court in the decision below. More specifically, assuming reserved rights should be recognized for the Wind River Reservation, this Court should accept the instant case to revisit the practicably irrigable acreage standard in light of its

subsequent holdings. For example, the Court should clarify the integration of the "moderate living" standard of the *Fishing Vessel* decision and the "primary purposes" standard of the *New Mexico* decision with the practicably irrigable acreage standard for use with respect to quantification of Indian reserved water rights.

III. ASSUMING, *ARGUENDO*, THAT RESERVED WATER RIGHTS SHOULD BE RECOGNIZED FOR THE WIND RIVER INDIAN RESERVATION, THE WYOMING SUPREME COURT ERRED WITH RESPECT TO THE PRIORITY DATE IT ASSIGNED TO SOME OF THOSE RIGHTS.

The Wyoming Supreme Court held that approximately 40,000 practicably irrigable acres, which were ceded by the Wind River Reservation Tribes in 1905 and then restored to the reservation from 1940 to 1974 by order of the Secretary of Interior, have a reserved water right with a priority date as of the date of creation of the reservation. The court stated no reasoning for this conclusion other than its concurrence with the special master's finding that the Indian's maintenance of an interest in the proceeds from the sale of ceded lands precluded a disestablishment of rights appurtenant those lands.

The Wyoming Supreme Court's ruling is inconsistent with this Court's decisions addressing disestablishment of Indian reservations, particularly *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), as well as those addressing the termination of Indian rights in disestablished lands, especially *Oregon v. Klamath Indian Tribe*, 473 U.S. 753 (1985). *Rosebud* indicates that the termination of Indian treaty rights by subsequent legislation may be found on the face of the legislation, in legislative history, or in circumstances surrounding its enactment. The cessation accom-

plished in the instant case by the 1905 Act, which diminished the reservation, occurred under circumstances virtually identical to those which this Court concluded constituted a disestablishment in *Rosebud*. Thereafter, beginning in 1940, portions of the ceded lands were added to or again made part of the Wind River Reservation for grazing purposes or were otherwise reacquired for the benefit of the reservation's tribes.

The court below concluded that the reservation had not been disestablished and, consequently, that reserved water rights for lands restored after 1940 were entitled to an 1868 priority date, the date of the treaty establishing the original reservation. However, with respect to the priority date for water to irrigate ceded lands restored to the reservation, *Rosebud* indicates that the date the reservation was originally created is inappropriate. In addition, the decision below is in conflict with this Court's decision in *Klamath*, where the Court held that disestablishment of a reservation terminates Indian rights in ceded lands.

In addition to the Wyoming Supreme Court's error with regard to water rights appurtenant to ceded lands restored to the reservation, the court also erred with respect to the priority date of lands conveyed to non-Indians or allotted to individual Indians and conveyed to non-Indian grantees, which were later reacquired by or on behalf of Indians. Here the court's holding conflicts with two opinions of the Ninth Circuit Court of Appeals.

In *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), the Ninth Circuit held that rights to water accompanying homestead lands reacquired by an Indian tribe carry a priority date determined by state law and that rights to water accompanying lands for which no water right was perfected under state law have a priority date as of the time of reacquisition. In contrast, the Wyoming

Supreme Court held that irrigable lands ceded to the United States, conveyed under public land laws to non-Indians, and then reacquired by or on behalf of Indians have a priority date as of the date of the original creation of the reservation. Instead, the court should have held that such rights have a priority date as of the time of reacquisition or, in the alternative, a date determined under Wyoming law.

In *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981), cert. denied, *Walton v. Colville Confederated Tribes*, 475 U.S. 101 (1986), the Ninth Circuit held that a non-Indian owner of an original Indian allotment obtains a reserved water right which may be maintained by the non-Indian's continued use of the water or lost by his non-use. *Anderson*, held that tribes which reacquire land previously allotted obtain a reserved right with an original priority date, but only where a previous non-Indian owner has not lost his right through non-use. The Wyoming Supreme Court required no showing of continued use by intervening non-Indian owners but rather granted an 1868 priority date with respect to all reacquired lands.

Assuming, *arguendo*, that reserved water rights should be recognized for the Wind River Indian Reservation, the court below erred in its decision regarding the priority date of the rights appurtenant to many parcels of land. This Court should grant Wyoming's petition for a writ of certiorari to correct this error.

CONCLUSION

For the reasons stated above, the amici curiae states respectfully urge that Wyoming's petition for a writ of certiorari be granted.

Respectfully Submitted,

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